

R.D. #0005-05
Union, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

**BIOMEDICAL APPLICATIONS OF HILLSIDE,
INC. D/B/A FRESenius MEDICAL CENTER¹**

Employer

and

Case 22-RC-12580

**DISTRICT 1199-J, NATIONAL UNION OF
HOSPITAL AND HEALTH CARE EMPLOYEES,
AFSCME, AFL-CIO**

Petitioner

DECISION AND DIRECTION OF ELECTION

I INTRODUCTION:

The Petitioner filed a petition under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, seeking to represent a unit of all full-time and regular part-time registered nurses (RNs), patient care technicians (PCTs), dialysis aides and equipment technicians employed by the Employer at its Union, New Jersey dialysis center. The Employer, contrary to the Petitioner, seeks to include in the unit two social workers and two dieticians. Based on the following facts and analysis, I find that: 1] as Section 9(b)(1) of the Act prohibits the inclusion

¹ The name of the Employer appears as amended at the hearing.

of professional employees in a unit with employees who are not professional, unless a majority of the professional employees vote for inclusion in such a unit, a self-determination procedure known as a *Sonotone*² election is appropriate, as described more fully below; and 2] social workers and dieticians are excluded from the unit found appropriate here.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,³ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.⁴

3. The labor organization involved claims to represent certain employees of the Employer.⁵

4. A question affecting commerce exists concerning the representation of certain employees of the Employer.

5. The appropriate unit(s) for the purposes of collective bargaining within the meaning of Section 9(b) of the Act are described *infra*.

² *Sonotone Corp.*, 90 NLRB 1236 (1950).

³ Briefs filed by the parties have been considered.

⁴ The Employer is a Delaware corporation engaged in providing kidney dialysis services at its Union, New Jersey facility, the only facility involved herein.

⁵ The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS:

A. Positions of Parties

The Petitioner amended its petition at hearing to seek to represent a unit of all full-time and regular part-time RNs, patient care technicians, dialysis aides, ward clerks and equipment technicians employed by the Employer at its Union, New Jersey facility, excluding supervisors, guards and all other employees. The Employer, contrary to the Petitioner, asserts that the two dieticians and two social workers are professional employees and should be included in the petitioned for unit because they share a commonality of interest with the RNs and the other petitioned for employees, working under the same terms and conditions of employment, having the same benefits and working side by side with the petitioned for employees to provide full care to patients.⁶ The parties have stipulated that the two dieticians and the two social workers are professional employees and that they are the only employees at issue in this proceeding.

B. Background

The Employer provides kidney dialysis treatment to patients at its Union, New Jersey facility six days per week, between the hours of 7:00 A.M. to 5:30 P.M. Patients enter the facility, comprised of a large waiting room, a treatment area for

⁶ The Employer's Exhibit 1 indicates that there are five RNs, one of whom is a per diem scheduled to work every Saturday, eight patient care technicians, one medical technician, one dialysis aide and one ward clerk. Excluding the two dieticians and two social workers that appear in that Exhibit, the Petitioner's proposed unit would be comprised of 16 employees while the Employer's proposed unit has 20 employees. The parties stipulated that the correct title of equipment technician is medical technician. The parties also stipulated that there is no contract bar.

patients consisting of 35 dialysis chairs separated from each other by curtains, an adjacent water treatment room, an employee lounge, two rest rooms, one for women and one for men, and an office area at the rear of the facility. Area Manager William Brookins, who oversees two other facilities in addition to this one, maintains his office in that area, as does Clinical Manager Lang Chan, as well as the two dietitians and the two social workers. In all, 22-23 employees work at the Union facility, all of whom report to Clinical Manager Chan who, in turn, reports to Area Manager Brookins.

Direct patient care is administered by the patient care technicians (PCTs) working under the direction of the RNs. The PCTs place the patients on the dialysis machines, monitor the four hour treatments and remove the patients from the machines. Any changes observed in the patients' conditions by PCTs during the course of treatment are immediately reported to the RNs, who work side by side with PCTs in the patient treatment area. RNs work 10 hour shifts. The record is silent as to the schedules of patient care technicians. All work hours are scheduled by the Clinical Manager.

The medical technicians treat the water used in the dialysis machines in the water treatment facility, adjacent to the patient treatment area. Ordinary tap water is unsuitable for use in dialysis machines, given the presence of harmful chemicals like fluorine and chlorine. The medical technicians monitor the equipment to make sure the generators are functioning properly and respond to calls from RNs and/or PCTs regarding specific equipment. The record is silent as to their work schedules.

The social workers and dietitians maintain offices in the rear of the facility where they do patient charting and make phone calls. They speak with patients about their dietary and/or social concerns while they undergo dialysis treatment. The record does not reflect how often or about what they converse or if every patient requires their services. There is record evidence that they make daily visits to the patient care area but no specific information beyond that. Their work schedules differ from that of the RNs in that they work five days per week from 9:00 A.M. to 5:00 P.M. Thus, for at least two and one half hours of each treatment day neither social workers nor dietitians are scheduled to work while patients are undergoing treatment.

The two social workers each work three days per week at the Union facility. Each also works two days per week at another of the Employer's locations. Social workers meet with patients to discuss their psycho-social needs. One record example is that of a patient missing appointments due to lack of transportation that was then arranged by a social worker. Appropriate housing facilities for patients who require it is another area addressed by social workers.

The two dietitians work for other employers in addition to the Employer here. One of the dietitians works three days per week at the Union facility while the other works two days per week at the Union facility, indicating that for at least one day per week there is no dietitian on duty. Dietitians review patient lab results and may suggest changes to a patient's diet or nutritional supplements or refer them for other treatment. Dietitians communicate this information to the RNs, either one on one in treatment rooms or at weekly team meetings. These weekly team meetings are

attended by RNs, social workers, dieticians, physicians and management. Patient charts are the primary source of information for all members of the team, although there is no record evidence of when patient charts are reviewed and by whom.

All of the employees share the same benefits: a choice of two different health care providers; a time bank; insurance; tuition reimbursement; and a 401(K) plan. They also share the same supervision, as all the employees report to Clinical Manager Chan, who in turn reports to Area Manager Brookins. All employees receive the same employee handbook and are given orientation training by the education department. RNs receive \$27-29 per hour⁷ and social workers and dieticians average about \$27.00 per hour. All three titles require appropriate degrees.

III. LEGAL ANALYSIS:

A. The Pragmatic or Empirical Community of Interest Test

The only issue before me is the appropriateness of a unit comprised solely of RNs, i.e., one that excludes the two professional titles of dietician and social worker. The Board has established a “pragmatic or empirical community of interest” test to be applied in evaluating the appropriateness of collective bargaining units in non-acute health care facilities such as this one. In this regard, the Board will consider traditional community of interest factors and factors deemed relevant by the Board in its rulemaking proceedings in collective bargaining units in the health care industry; the evidence presented during rulemaking with respect to units in acute care hospitals;

⁷ The per diem RN receives \$37.00 per hour in lieu of benefits.

and prior precedent involving either the type of unit sought or the particular type of health care facility in dispute. *Park Manor Care Center, Inc.*, 305 NLRB 872 (1991).

In the health care industry, as any other, unions are not required to organize in the most comprehensive unit available or even the most appropriate unit. They need only select an appropriate unit. *Fairbault Clinic*, 308 NLRB 131, 133 (1992); *Newington Children's Hospital*, 217 NLRB 793 (1975). Scrutiny of the appropriateness of an alternative unit is not the issue, unless the unit sought by the petitioner is inappropriate. *Marian Manor for the Aged*, 333 NLRB 1084, 1094 (2001); 53 Fed. Reg. 33932.

I find that a unit limited to RNs is an appropriate unit. In reaching this conclusion, I am guided by Board precedent, the information disclosed by the Board's rule-making proceedings and the community of interest factors reflected in the record.

B. Rulemaking Factors

The Board has historically recognized the unique interests of RNs that generally make their separation appropriate. See Section 103.30, Rules and Regulations of the National Labor Relations Board, 29 CFR 102 et seq.; *Fairbault Clinic*, above at 133. A review of the information disclosed in the course of the Board's rule-making process supports this conclusion. See *Collective-Bargaining Units in the Health Care Industry*, 53 Fed. Reg. 33900, 29 CFR 103 et. Seq. (9/1/88). In those proceedings, the Board found that RNs in acute care hospitals constitute a unique group. In that regard, RNs appropriately constitute a separate bargaining unit in that their profession demands continuous interaction with patients and constant

patient care responsibilities and they possess distinct functions and collective bargaining interests. 53 Fed. Reg. 33911, 33917. Many of the factors leading to that conclusion are appropriate here. Thus, the Board found that RNs must pass state licensing exams which are uniform throughout the country and must follow nurse practice acts which impose requirements that may bring them into conflict with other professionals and which preclude other professionals from performing their work. 53 Fed. Reg. 33912-3.

The Rulemaking proceedings also revealed the historical desire of RNs for separate representation as well as the objections of other professional groups to their inclusion with RNs. 53 Fed. Reg. 33913-4. The Board also found that the evidence failed to establish that separate representation would lead to wage whipsawing, strikes, jurisdictional disputes and bargaining unit proliferation.

Additionally, the Board also concluded that the use of multidisciplinary teams does not detract from the separateness of their identity or the separate appropriateness of RN units. Thus, the Board found that the interaction of RNs and other professionals is a process to further the delivery of patient care and did not alter either the responsibility of licensed professionals in their scope of practice or their wages, hours, benefits or functions. 53 Fed. Reg. 33913.

C. Board Precedent

Park Manor, above at 875, directs a consideration of prior cases involving either the type of unit sought or the particular type of health care facility in dispute. In *South Hills Health System*, 330 NLRB 653 (2000), the Board rejected an

Employer's request for an all professional unit and found a unit of RNs to be appropriate in a non-acute care facility that followed a team approach to patient care. A review of Board precedent since *Park Manor* reveals that the Board has regularly applied the pragmatic community of interest standard to approve units limited to RNs in non-acute health care facilities. See *South Hills Health System*, above; *Marian Manor for the Aged*, above; *Charter Hospital of St. Louis*, 313 NLRB 951, 954 (1994); *Holliswood Hospital*, 312 NLRB 1185 (1993); *McLean Hospital Corporation*, 311 NLRB 1100 (1993). In those cases the Board found that RNs constituted a sizeable homogenous grouping of professionals whose specialized training and licensure requirements clearly prevent other professions from performing their work. Likewise, their participation in interdisciplinary teams did not alter the fact that they still had responsibility for their individual scope of practice and, unlike other professionals, for the overall care of patients.

D. The Instant Case

In seeking to have the two social workers and two dieticians included in the bargaining unit, the Employer claims that their professional degree requirements and salary structure are comparable to that of the RNs and that they share the same terms and conditions of employment, i.e., they report to the same supervisor, they work at the same facility, they share the same benefits package and they are an integral part of a team that provides full care service to the patients treated at the Employer's facility.

The record reveals that social workers and dieticians have working conditions substantially different from those of the RNs. The primary work area for social

workers and dieticians is in offices at the rear of the facility. While they have patient contact in the patient care area, the record is inconclusive as to how significant that contact is. Even though the social workers and/or dieticians are present in the patient care area on a daily basis, there is no indication as to what services they are rendering, what percentage of the day they spend there or what percentage of patients require their services.

To the contrary, the RNs' responsibilities are in the patient care area where they are the primary overseers of dialysis treatment administered by the patient care technicians and the first to be consulted when a change in a patient's condition is noted. Social workers and dieticians work between the hours of 9:00 A.M. to 5:00 P.M. and none works more than three days per week at the Employer's facility. Thus, the hours of work for social workers and dieticians differs significantly from those of RNs, who work a 10-hour shift. The social workers split their time between the Employer's Union facility and another of the Employer's facilities while the dieticians split their time between this Employer's facility and other employers' facilities. The record reflects a substantial block of time, i.e., daily between 7:00-9:00 A.M and 5:00-5:30 P.M., when the RNs and their technical support personnel are engaged in patient care in the absence of any of the dieticians and social workers. Actual work related contact between the RNs and the social workers and dieticians appears to be limited to weekly team meetings and occasional communication between the RNs and/or the social workers or dieticians at patients' dialysis chairs. There is no record indication of how often that contact occurs.

Based on the factors noted above, I find that the RNs' participation in team care does not compel a conclusion that a combined unit of RNs and other professional employees is the only appropriate unit. *South Hills Health System* at 657. In this regard, the Employer's contention that the exclusion of the social workers and dietitians would create a residual unit is misplaced, as these unrepresented professional employees can constitute an appropriate unit by themselves, not a "fringe group." *Holliswood Hospital*, above at 1197; *Almacs Inc.*, 176 NLRB 670 (1969); *Ward Baking Co.*, 139 NLRB 1344 (1962). Accordingly, applying the "pragmatic and empirical community of interest test" set forth in *Park Manor*, above, I find a unit of registered nurses employed at the Employer's Union facility to be a unit appropriate for collective bargaining.⁸

IV. UNITS/VOTING GROUPS:

The Board is prohibited under Section 9(b)(1) of the Act from including professional employees in a unit with employees who are not professionals, unless a majority of the professionals vote for inclusion in such a unit. *Sonotone Corporation*, above. I shall therefore direct elections in the following voting groups:

Voting Group A

All full-time and regular part-time registered nurses, including per diem nurses, employed by the Employer at its Union, New Jersey facility, excluding all social workers, dietitians and non-professional employees,

⁸ In this regard, I find the Employer's reliance on *Kaiser Foundation Health Plan of Colorado*, 230 NLRB 438 (1977) misplaced as there the petitioner sought to exclude RNs from the unit and the matter was decided prior to *Park Manor*, above. Likewise, reliance on *In Re Upstate Home for Children, Inc.*, 309 NLRB 986 (1992) is misplaced as the employer there was not a health care institution, nor did the RNs there have distinct interests apart from other professional employees, as here.

including patient care technicians, dialysis aides, ward clerks, medical technicians, confidential employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.⁹

Voting Group B

All full-time and regular part-time patient care technicians, dialysis aides, ward clerks, and medical technicians employed by the Employer at its Union, New Jersey facility, excluding all professional employees, including registered nurses, social workers, dietitians, confidential employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.¹⁰

The employees in the non-professional Voting Group B will be polled to determine whether or not they wish to be represented by the Petitioner. The employees in Voting Group A will be asked two questions on their ballot:

1. Do you desire to be included with the employees in Voting Group B (all full-time and regular part-time patient care technicians, dialysis aides, ward clerks and medical technicians employed by the Employer at its Union, New Jersey facility) in a single unit for purposes of collective bargaining?
2. Do you desire to be represented for the purposes of collective bargaining by District 1199-J, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO.

If a majority of the professionals in Voting Group A vote “yes” to the first question indicating their wish to be included in a unit with non-professional employees, they will be so included. Their vote on the second question will then be counted together with the votes of the non-professional employees. If the professional employees in Voting Group A vote against inclusion, they will not be included with the non-professional employees. Their vote on the second question will then be

⁹ There are five potential voters employed in Voting Group A.

¹⁰ There are eleven potential voters employed in Voting Group B.

separately counted to determine whether or not they wish to be represented by the Petitioner.

The unit determination is based in part, then, upon the results of the election among the professional and the other non-professional employees. However, I now make the following finding in regard to the appropriate unit:

If a majority of the professional employees in Voting Group A vote for inclusion in a unit of non-professional employees, the following will constitute the unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time registered nurses, including per diem nurses, patient care technicians, dialysis aides, ward clerks and medical technicians employed by the Employer at its Union, New Jersey facility, excluding social workers, dietitians, confidential employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.

If a majority of the professionals do not vote for inclusion with the non professional employees, the following two groups of employees will constitute separate bargaining units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Voting Group A

All full-time and regular part-time registered nurses, including per diem nurses, employed by the Employer at its Union, New Jersey facility, excluding patient care technicians, dialysis aides, ward clerks, medical technicians, social workers, dietitians, confidential employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.

Voting Group B

All full-time and regular part-time patient care technicians, dialysis aides, ward clerks and medical technicians employed by the Employer at its Union, New Jersey facility, excluding all professional employees including registered nurses, social workers, dietitians, confidential employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.

V. DIRECTION OF ELECTION:

An election by secret ballot shall be conducted by the undersigned among the employees in the voting groups found appropriate at the time and place set forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the voting groups who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been

permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by **District 1199-J, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO** and also to determine whether or not the professional employees in Voting Group A desire to be included with the non-professional employees in Voting Group B.

VI. LIST OF VOTERS:

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list for the voting groups found appropriate above, containing the full names and addresses of all the eligible voters in each voting group, shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the NLRB Region 22, 20 Washington Place, 5th Floor, Newark, New Jersey 07102, on or before **April 7, 2005**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

VII RIGHT TO REQUEST REVIEW:

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **April 14, 2005.**

Signed at Newark, New Jersey this 31st day of March 2005.

/s/ Gary T. Kendellen

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